Capt. John Pollock's — January 28. 1760. 33

REPLIES

FOR

Sir *Michael Stewart* of *Blackhall*, Baronet, and *William Cuningham* of *Craigends*, Esq;

TO

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The ANSWERS for Capt. *John Pollock* in the Regiment of Foot commanded by his Grace the Duke of *Richmond*.

AT *Michaelmas* last, a Claim was presented to the Meeting of Freeholders of the County of *Renfrew*, for inrolling Capt. *Pollock* in their Number. The Titles produced for him were, a Charter of Resignation under the Great Seal, in his favour, of the just and equal Half of all and haill the Twenty Pound Land of *Over-Pollock*, *pro indiviso* with his Brother, proceeding upon his Brother's Resignation. Seisin had been properly taken on this Charter; and Reference was made to the Cess-books, then lying on the Table, that the valued Rent of these Lands amounted to *L.* 1000 *Scots*.

This appeared to Sir *Michael Stewart*, and others of the Freeholders, a very new Kind of Estate, and still a more extraordinary Qualification, to intitle to be inrolled as a Freeholder. It appeared to them, that however, under these Titles, a common Estate might be created to both, it could not be called the Property, or proper Estate of either; the Possession behoved to be common, in terms of the Right; nor could the Valuation of it receive any proper Division. Sir *Michael Stewart* there-

fore objected to his being inrolled: which Objection, however, was over-ruled by a Majority of Voices in the Meeting.

Sir *Michael Stewart* and Mr *Cuningham*, two of their Number, preferred a Complaint to this Court of this Inrolment: In which the proper Foundations of their Objection are very juſtly ſtated.

Anſwers have been made by Appointment of the Court; in which it is treated as altogether frivolous, and proceeding upon Miſtakes in Law: And an ingenious Argument is offered, by which the Reſpondent perſuades himſelf, that they have ſatisfied your Lordſhips of their Aſſertion.

The Petitioners ſtill apprehend the Objection is founded in the ſtrongeſt Principles of Law; and ſhall, in Reply, only ſhortly ſtate thoſe to the Court.

1*mo*, The Diſtinction betwixt Property and Community is one of the firſt Leſſons in our Law-books. Lord *Stair* has thus ſtated it, *lib.* 2. *tit.* 1. *Of Rights real, or Dominion*, § 28. *in initio*. "But the Nature of Property is beſt underſtood when "it is compared with Community: For in this they both agree, "that either hath a Power to diſpoſe of Things; and in this "they differ, that Community is a promiſcuous and a conjunct "Power, but Property is a diſtinct and ſeparate Power of Diſ-"poſal." And the ſame Diſtinction is ſtated in the Civil Law, betwixt *res communis*, and *res privata* or *ſingulorum*. *Vinnius*, treating of this Matter, ſtates it thus. "*Dominium eſt plena* "*in rem poteſtas*, § *ult. Inſt. de uſufruct.*; *ſive jus de re pro ar-*"*bitratu ſtatuendi*, *l. in re* 21. *C. Mand.* Hoc idem jus a re "quæſita proprietas dicitur." The Notion of Property then is, That it is the full Power of managing and diſpoſing of the Subject. If one or more are concerned in the Power of Management or Diſpoſal, it may be a kind of Eſtate in them; but is, in no Senſe of Law, their proper Eſtate or Property. And, in the Law, theſe are very differently conſidered, in various Inſtances. And particularly, as Commonty is conſidered as adverſary to all Induſtry and Improvement, it is diſcountenanced of the

the Law, and every Method taken to divide, and reduce it to Property. This, on the other hand, is conſidered as the Parent of honeſt Induſtry and Improvement; and therefore is the Favourite of the Law. But they are always conſidered as inconſiſtent; and common Property, however an Expreſſion in vulgar Language, is in Law an abuſive Way of ſpeaking: It is truly a Contradiction in Terms.

2*do*, An Eſtate therefore held *pro indiviſo*, by two or more Perſons, however it may be in them a common or certain Eſtate, or perhaps a Freehold; yet it is certainly the Property of neither. Neither can by himſelf diſpoſe of it; nor indeed exerce any one Act of Adminiſtration concerning it: And therefore where the Law has required, as a Title to vote, that one ſhould be infeft in Property, and in Poſſeſſion, of Lands of certain Extent or Valuation, it cannot be underſtood of ſuch common or joint Eſtate. And ſuch are the Terms of the Act 1681; and which, in ſo far, differ from all the former Acts in this Matter.

3*tio*, But it is ſtill more improper to talk of the Diviſion of ſuch Eſtate in Parts. Both hold the whole and every Part of it *pro indiviſo*; and therefore as the whole belongs to both, ſo does the half, and every other Part of it. Their Share of the Management or Diſpoſal of ſuch Eſtate may be according to certain Proportions; and in this Senſe only can there be any legal Meaning in an Infeftment in the Half, or any other Part, *pro indiviſo*. If it is underſtood in any other Way, it is altogether anomalous, and inconſiſtent with the Right conſtitute by the Infeftment *pro indiviſo*; which is a common and undivided Right to the whole and every Part of ſuch Eſtate. And, in the ſame Manner, both are liable for Ceſs and other public Burdens, for the whole and every Part of it. One is not liable for one Half, and one for another; but the whole Subject, and both the Proprietors of it, are liable for the whole and every Part of the public Burdens. And a Charter granted by the King, of Lands to be held *pro indiviſo*, makes no Difference in this Matter.

The Objection therefore made by the Petitioners is founded in both its Branches, *1ſt*, That it proceeds upon an undivided Property; *2dly*, That the Valuation is alſo undivided.

This whole Objection was well illuſtrated from the Caſe of Adjudications mentioned in the Act 1681, which is ſtated in the Petition. This was probably the only Caſe that occurred to the Legiſlature, of Eſtates held *pro indiviſo*. The preſent is, perhaps, the only Inſtance of a Purchaſe of that kind. And in thoſe legal Sales or Diſpoſitions, under this Deſcription, which are produced by the neceſſary Operation of Law, the Law has expreſsly laid it down as a Rule, with one Exception only, That however extenſive theſe may be, they ſhall give no Qualification to vote.

The ingenious Hiſtory given of Appriſings and Adjudications, in the Anſwers, does not take off the Force of the Obſervation. The Difficulty of adjuſting the Proportions of the valued Rent of each Shire, could not occur more than in the preſent Caſe; as, till a Diviſion by Law takes place, the Property *pro indiviſo* is in the whole Adjudgers coming in *pari paſſu*. If the Lands, therefore, were 800, or 2400, or any other Valuation, and there were ſo many Adjudgers; according to the Rule pled for the Reſpondent, That the valued Rent in ſuch Caſe *dividit ſeipſum*; each would be intitled to a vote according to their Shares. But the Law has conſidered, that none of them have any Property in the Subject, however they may have a common Eſtate in it, and ſo have denied their Votes; and, *ex favore* only, by an expreſs Exception, has given this Privilege to the firſt Adjudger, with many others, as *in ſolatium* for the Preference he had been deprived of.

The Difference betwixt ſuch Eſtate altogether held *pro indiviſo*, and the common Property in Muirs and Moſſes, and ſuch other Parts and Pertinents of Property, is obvious. Theſe are conſidered as altogether acceſſory to the Property to which they belong, and are regulated thereby. The Rule of Law is, *Acceſſorium ſequitur ſuum principale*; and therefore the Reaſoning from theſe

theſe to an Eſtate held *pro indiviſo*, is altogether inconcluſive.

The Caſe of Heirs-portioners claiming Votes in different Counties, the Petitioners are informed, has frequently occurred, and ſuch Claims have been uniformly rejected: And in no Inſtance of this kind, which muſt have frequently happened, has any Complaint been made to the Court. Such Acquieſcence ſhows the Law in a ſtronger Manner, than an expreſs Deciſion on the Point.

The Reſpondent has further inſiſted, That in ſuch Caſe there was no Neceſſity for dividing the valued Rent: It was ſaid, that in ſuch Eſtate *dividit ſeipſum*. The Petitioners are adviſed, this Doctrine is altogether miſapplied in the preſent Caſe. By the Nature and Form of the Right, the Lands are held *pro indiviſo*; and cannot, in Conſiſtency with ſuch Right, be divided, while they are ſo held. And the Petitioners doubt, if there is any Method in Law, by which ſuch heteroclite Eſtate can be divided. The Method introduced in Law, in common Caſes, for dividing of Commonty, which is held as Part and Pertinent of a Property-eſtate is, that ſuch Diviſion ſhould be made, according to the Valuation or Poſſeſſion of ſuch proper Eſtate. But ſuch Rule cannot apply, where the whole Eſtate is held common and *pro indiviſo*. The Petitioners, on this Head, would only beg Leave to know, how this Rule would apply as to the old Extent of theſe Lands. It might be pled in the ſame Way, that the Extent *dividit ſeipſum*; and in this Way, ten Votes might have been created out of this Eſtate in place of two. But the Abſurdity of this is too evident to be inſiſted on.

It is therefore hoped, your Lordſhips will find, there is in the preſent Caſe no proper Eſtate, nor Poſſeſſion, nor Valuation, in either of the Brothers; but the whole is common, according to the Nature of their Rights; that neither have a legal Qualification; and particularly that Capt. *Pollock* is not intitled to vote, in terms of the Statute 1681, or of the 16th of his preſent Majeſty.

In reſpect whereof, &c.

JOHN CRAIGIE.

1. Feb: 1760

Prestongrange this a substantial right

Minto evidence insufficient that this gentleman is infeft in 000 £ of valued Rent

Coalston of the same opinion

President suppose three heirs infeft in 1200 £ and each married there husband by this rule each may have a a vote. it is almost impossible to divide them so that each shall have a vote.

Contradictory to the decisions & uniform practice

There is then an end of Divisions of the valuation and old extent.

neither have a right to vote. the one brother or the other.

James the act 1681 that an adjudger may vote without a division why not a disponee

Alemore of the presidents opinion, by the argument used there will be no occasion for the division of the old extent;

Just: Clerk mentioned the case of Duke of montrases voters 15, on the old extent undivided 1732 were cadet. because the old extent was not divided. & affirmed in the House of Peers

Lords Talbot till thursday next to give in memorials